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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CAROLE MIGDEN, FRIENDS OF CAROLE MIGDEN COMMITTEE, and RE-ELECT SENATOR CAROLE MIGDEN COMMITTEE, Plaintiffs, **v.** **CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION; ROSS JOHNSON, in his official capacity as Chairman of the California Fair Political practices Commission; and TIMOTHY A. HODSON, A. EUGENE HUGUENIN, JR. ROBERT LEIDIGH and RAY REMY in their offical capacities as memebers of the California Fair Political Practices Commission,** Defendants.	2:08-cv-00486-EFB

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Hearing Date: April 1, 2008
Time: 10:00 a.m.
Courtroom: 25
Judge: Hon. Edmund F. Brennan

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

SCOTT HALLABRIN (SBN 076662)
LAWRENCE T. WOODLOCK (SBN 137676)
KOURTNEY VACCARO (SBN 173558)
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INTRODUCTION

At its core, Senator Carole Migden's action seeks to enjoin the State of California, and by implication over 30 other states with similar statutes, from preventing an elected official who leaves office from absconding with unspent campaign funds.

This action challenges a provision of California's Political Reform Act, California Government Code Sections 81000 *et seq* (the "PRA") relating to surplus campaign funds. At the outset, Plaintiffs Carole Migden, Friends of Carole Migden committee, and Re-elect Senator Carole Migden committee (hereinafter referred to as "Senator Migden") seek a preliminary injunction to prevent the Fair Political Practices Commission and its Chairman and commissioners (referred to collectively as "the FPPC"or "Defendants") from enforcing California Government Code section 89519 ("Section 89519"). By filing this action, Senator Migden seeks to preempt a pending state enforcement action against her, and asks this Court to enjoin, without the benefit of trial, a law originally enacted nearly thirty years ago to curb the conversion of campaign funds to the personal use of candidates.

In a nutshell, Senator Migden alleges that it is unconstitutional for a state to limit the uses to which a candidate can put her campaign funds after she has left office without first having transferred those funds to a future campaign for elective office. Specifically, she alleges that *any* deadline for making such a transfer is "arbitrary," and unconstitutional for that reason. Defendants will show that there is an unassailable state interest in such a rule – the need to guard against the enhanced potential for a *former* candidate to use campaign funds for personal enrichment, a potential that erodes the integrity of the electoral process by (at least) deepening the public perception that campaign contributions exert undue influence on candidates who may rely on them after leaving office for more than their usefulness in funding campaign speech.

The most significant fact evident in Senator Migden's 27-page Memorandum of Points and Authorities in Support of her Motion for Preliminary Injunction (hereafter "Ps & As") is her inability to refer this Court to a single decision in which a "surplus funds" statute has been struck down by a court. Her challenge to Section 89519 is not quite unprecedented, but she does not discuss the genuinely apposite case law. Her legal argument is based entirely on challenges to very different kinds of statutes. That fact is made all the more remarkable by the widespread employment of "surplus funds" statutes in the campaign finance laws of other states, cities, counties, and United States territories.

The novelty of this action, and its potential repercussions across the nation, demand a particularly close inspection of Senator Migden's constitutional claim. The real explanation for her lawsuit is not a newly discovered constitutional flaw in statutes like the one at issue here. It is the consequence of a breakdown in negotiations relative to an investigation of more than a hundred alleged violations of California law by Senator Migden, her agents, and various political committees over the past five years. Many of these violations will be detailed at length in Defendants' Counterclaim, but mention of them here is necessary to illuminate the underpinnings of the Motion now before this Court.

Senator Migden argues both that Section 89519 is unconstitutional on its face and as applied to circumstances she elaborates in her Ps & As and numerous associated declarations. The "as applied" challenge is a contrivance that masks a simpler reality – Senator Migden not only ignored the surplus

funds statute that she challenges here, but other equally fundamental rules, in a pattern that continued for years until the FPPC investigation that gave rise to this preemptive lawsuit.

ARGUMENT

Senator Migden has no likelihood of success on the merits in her challenge to a kind of statute found in over thirty other states across the country, a kind of statute challenged – without success – only two or three times before. Further, any harm that Plaintiff allegedly suffers does not outweigh the harm done to the people of California if this Court were to enjoin a critical component of a statutory scheme that limits or prohibits candidates from turning campaign funds to their personal benefit. Instead of granting Senator Migden leave to spend surplus campaign funds after a five-year period in which she committed over a hundred violations of the PRA – by no means all of them related to the surplus funds statute – the FPPC asks this Court to deny her request for preliminary injunction. Senator Migden wishes to use this Court to prevent Californians from regulating improper uses of campaign funds that more than two-thirds of the states in this nation have outlawed and provide her reelection campaign with an infusion of over $600,000. Senator Migden's constitutional claims are extremely dubious – when they have been litigated in other states, they have been rejected. This brief explains why, but due to the absence of developed case law on point, it will be necessary to begin with a review of campaign finance laws pertinent to this challenge.

A. Section 89519 Is Part Of A Larger Statutory Scheme Aimed At Curtailing Personal Use Of Campaign Funds

Twenty five years ago, the California Attorney General issued an Opinion in response to a question from a California state senator, the Honorable Alfred E. Alquist, who inquired about his legal right to dispose of surplus campaign funds through a testamentary bequest in his will. 66 Op. Atty. Gen. Cal 33 (1983) (the "Alquist Opinion"). Two years before, the Legislature had enacted California Elections Code section 12404, the direct ancestor of the statute at issue in this action. (*See* Declaration of Heather M. Rowan at ¶ 4 and Exhibit C attached thereto.) The language of that statute was, in all respects pertinent to this constitutional claim, identical to the statute now before this Court.[1/] (*Id.* at ¶

1. Section 12404 was part of a larger package of legislation (SB 42, Carpenter) banning the "personal use" of campaign funds. (*See* Rowan Decl. at ¶4.)

4.) The Attorney General found that an officeholder did not "own" campaign funds held by a campaign committee, but might have a qualified ownership interest in campaign funds contributed directly to the officeholder, under the law then in effect. Nonetheless, the Alquist Opinion concluded that any testamentary bequest of campaign funds would be limited to the permissible uses of surplus campaign funds described in California Elections Code section 12404.[2/] It is no longer possible for a natural person to receive more than a minimal sum of political contributions before a campaign committee is formed (Cal. Gov. Code § 82013(a)) effectively eliminating doubts expressed by the Attorney General over the possibility that campaign funds might be personal property that a candidate could take with her after leaving office. It is now settled law in California, and in jurisdictions across the country, that campaign funds are *not* the personal property of a candidate.[3/] Statutes prohibiting the "personal use" of campaign funds are now prominent in every jurisdiction, statutes that might be called "expenditure limitations"on the use of campaign funds, whose constitutionality has seldom been questioned, and which have been upheld against the few challenges actually attempted. (*See* Rowan Decl. at ¶ 2 and Exhibit A attached thereto (showing a Federal Election Commission study of state laws across the country that are strikingly similar to California's own laws); *see also, e.g., State of Alaska v. Alaska Civil Liberties Union*, 978 P.2d 597, 631-32 (Alaska 1999), cert. denied 528 U.S. 1153 (2000).)

Federal law also bans the personal use of surplus campaign funds. When Congress enacted the 1989 Ethics Reform Act (2 U.S.C. Section 439a), it eliminated the infamous "grandfather clause"

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2. Because the California Attorney General is the state's chief law enforcement officer, he has jurisdiction over all state law, including California's Political Reform Act ("PRA"). Over the years, the Attorney General has issued approximately 95 Opinions that either construe sections of the PRA, or mention the PRA in the course of discussions focused on other subjects. Defendant FPPC, the administrative agency charged with interpreting and implementing the PRA, is also authorized to issue written advice on the PRA under California Government Code section 83114, and has issued approximately 10,000 opinions and advice letters since 1975, which are available on WestLaw and Lexis.

3. *See, e.g. Harold Guy Hunt v. State*, 642 So.2d 999 (1993) – Alabama Governor convicted for use of surplus campaign funds to pay the mortgage on his farm: *Cicoria v. State of Maryland*, 598 A.2d 771 (1991) – county officeholder convicted of depositing campaign funds into a personal checking account and using those campaign funds for personal benefit.

which permitted members of Congress elected before 1980 to convert campaign funds to personal use when they retired.[4/]

1. Section 89519 Pertains To Expenditure Limitations Only To The Extent That The Spending Of Surplus Funds Is Limited

Senator Migden's Ps & As lack any citation to a decision bearing on "expenditure limits" created to limit or bar the conversion of surplus campaign funds to a candidate's personal use. Her silence on the law most pertinent to her argument is a powerful indicator that her constitutional claim lacks merit.

The thrust of Senator Migden's facial challenge is that the PRA's "surplus campaign funds" statute is an "expenditure limitation," a class of laws that she claims are "almost always are found to be unconstitutional." (Ps & As 13:3-4.) because they burden core political speech – a candidate's campaign speech – and cannot be "narrowly tailored" to serve a "compelling state interest." Before further discussion of this misleading argument on the facial constitutionality of Section 89519, the Court may find it convenient to review that statute itself, and associated provisions of the PRA. We begin with the challenged statute:

> **Use of Surplus Campaign Funds**
>
> (a) Upon leaving any elected office, or at the end of the postelection reporting period following the defeat of a candidate for elective office, whichever occurs last, campaign funds raised after January 1, 1989, under the control of the former candidate or elected officer shall be considered surplus campaign funds and shall be disclosed pursuant to Chapter 4 (commencing with Section 84100).
>
> (b) Surplus campaign funds shall be used only for the following purposes:
>
> (1) The payment of outstanding campaign debts or elected officer's expenses.
> (2) The repayment of contributions.
> (3) Donations to any bona fide charitable, educational, civic, religious, or similar tax-exempt, nonprofit organization, where no substantial part of the proceeds will have a material financial effect on the former candidate or elected officer, any member of his or her immediate family, or his or her campaign treasurer.
> (4) Contributions to a political party committee, provided the campaign funds are not used to support or oppose candidates for elective office. However, the campaign funds may be used by a political party committee

4. See Craig Winneker, "Rules on Converting War Chests Get a Fine-Tuning," Roll Call, May 9, 1991, and Susan B. Glasser, "Former Members Convert $6.4 Million in War Chest Funds to Personal Use in the Past 12 years," Roll Call, April 1, 1991. Both articles are available in LEXIS' News Library.

> to conduct partisan voter registration, partisan get-out-the-vote activities, and slate mailers as that term is defined in Section 82048.3.
>
> (5) Contributions to support or oppose any candidate for federal office, any candidate for elective office in a state other than California, or any ballot measure.
>
> (6) The payment for professional services reasonably required by the committee to assist in the performance of its administrative functions, including payment for attorney's fees for litigation which arises directly out of a candidate's or elected officer's activities, duties, or status as a candidate or elected officer, including, but not limited to, an action to enjoin defamation, defense of an action brought of a violation of state or local campaign, disclosure, or election laws, and an action from an election contest or recount.[5/]

Cal. Gov. Code § 89519.

As pertinent to the constitutional claims, Subdivision (a) provides that any campaign funds remaining to a candidate on leaving office become "surplus" funds whose use is restricted as described in Subdivision (b). A candidate wishing to run for office in the future is permitted to open a campaign committee and to transfer any or all remaining campaign funds into the new campaign committee, at any time prior to leaving her current office. Senator Migden does not allege otherwise. Her claim is rather that the "deadline" for such a transfer is "arbitrary," and that if a candidate leaves office without having provided for a future campaign, the surplus funds statute becomes an expenditure limitation. Yet it does not follow that such a statute is presumptively unconstitutional, a point that becomes apparent when the statute is viewed in its larger context within the PRA, and in light of similar restrictions in other jurisdictions.[6/]

5. The statute continues in Subdivision (c) with rules regarding use of campaign funds to install or modify home security systems, which are not at issue in this action.

6. Senator Migden repeatedly asserts that "expenditure limits" are all but presumptively unconstitutional because they are subject to strict scrutiny. Defendants deny (*infra*) that strict scrutiny is the appropriate standard of review for Section 89519, but even if this Court were to apply strict scrutiny, Senator Migden overstates the consequences. "In conducting strict scrutiny review, it is essential to acknowledge that such scrutiny is not 'strict in theory, but fatal in fact'." *Homans v. City of Alberquerque*, 366 F.3d 900, 906 (10th Cir. 2000) (citations omitted). The Tenth Circuit went on to upbraid appellees for overlooking "this repeated admonition by the Supreme Court" (*Id.*), a common failing among plaintiffs in campaign finance cases.

2. In Conjunction With Reporting Obligations, The "one Bank Account Rule" Promotes The Public's Interest In Monitoring Candidate Disclosure

In common with the law of virtually every jurisdiction with any form of campaign finance regulation, the PRA allows a candidate[7] to have *one* campaign bank account and *one* controlled committee for any particular office. This is often colloquially termed the "one bank account rule." *See* Cal. Gov. Code § 85201; Cal. Code Regs., tit. 2, § 18524. California's provision allows a candidate to have one campaign bank account and one controlled committee for each specific election. Nothing in the PRA bars a candidate from establishing, at any time, other campaign bank accounts or committees for future elections. But each campaign for a given term in a given office must be run from a single campaign bank account. All funds used to support a particular campaign must be placed into that bank account and spent from it.

California Code of Regulations, Title 2, section 18524 explains and implements the one bank account rule. Subdivision (b) specifically authorizes the transfer campaign funds to a money market account, as follows:

> (b) The candidate may transfer funds from the campaign bank account to certificates of deposit, interest-bearing savings accounts, money market accounts, or similar accounts which shall be established only for funds for the same elective office for which the campaign bank account was established. *Prior to expenditure, the funds shall be redeposited in the candidate's campaign bank account.*

Cal. Code Regs., tit. 2, § 18524(b) (emphasis added).

The one bank account rule promotes the public interest in disclosure of campaign receipts and expenditures, which must be reported in detail as required under California Government Code sections

7. "Candidate" is defined in the PRA to include "an individual who is listed on the ballot or who has qualified to have write-in votes on his or her behalf counted by election officials, for nomination for or election to any elective office. . .. An individual who becomes a candidate shall retain his or her status as a candidate until such time as that status is terminated pursuant to Section 84214." Cal. Gov. Code § 82007. Thus under the PRA a "candidate" is not only an individual running for a particular office, but also a person *holding* that elective office.

84200 *et seq.*[8/] Campaign reporting requirements like those of the PRA are also found in nearly every jurisdiction, and are not challenged in this action.

Jurisdictions with campaign finance laws require regular public reporting of all funds deposited into a campaign bank account, and all expenditures made from that account. This practice is nearly universal because public disclosure is required to protect well-settled public interests in both the source of campaign funds, and their use. In *Nixon et al. v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), the Supreme Court succinctly described these interests in a discussion of the threats posed by large contributions to candidates for public office:

> Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions. . .. Congress could legitimately conclude that the avoidance of the appearance of improper influence is also critical. . .if confidence in the system of representative is not to be eroded to a disastrous extent. . . . Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns.
>
> In speaking of improper influence and opportunities for abuse in addition to *quid pro quo* arrangements, we recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors.

Id. at 388-89, internal citations and quotation marks omitted, emphasis added.

3. The Purpose Of The Surplus Funds Statutes Is To Prevent Personal Use Of Campaign Funds

Section 89519 concludes a series of provisions that restrict the use of campaign funds for the personal benefit of the candidate. Cal. Gov. Code §§ 89511 – 89518. Each of these provisions limits or bans the expenditure of campaign funds on a variety of uses, a feature the PRA has in common with essentially every jurisdiction with a campaign finance law. (*See* Rowan Decl. at ¶ 2 and Exhibit A attached thereto for a comprehensive view of state laws.) Thus, for example, a candidate may not use campaign funds to purchase a car or a house for herself, or to pay herself a salary for the performance

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8. The first statement in a list of purposes served by the PRA, given at Cal. Gov. Code section 81002, is this: "Receipts and expenditures in election campaigns should be fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited." *See* Cal. Gov. Code § 81002(a). Such campaign reporting programs are seldom vulnerable to constitutional attack. *See, e.g. ACLU of Nevada v. Heller*, 378 F.3d 979, 991-92 (9th Cir. 2004).

of political, legislative, or governmental activities. Cal. Gov. Code §§ 89516, 89517, and 89518. Other statutes within this series limit other kinds of campaign fund expenditures; if an expenditure confers a personal benefit on the candidate worth $200 or more, the expenditure must be *directly* related to a political, legislative, or governmental purpose and, absent a tangible personal benefit, such expenditures must still have some demonstrable relationship to a legitimate political, legislative, or governmental purpose.

Notwithstanding Senator Migden's claim that "because limits on campaign expenditures burden core First Amendment activity, they almost always are found to be unconstitutional" (Ps & As at 13:3-4), the reality is quite the opposite. A Federal Election Commission study identifies numerous campaign "expenditure limitations" throughout the United States, including both "personal use" and "surplus funds" restrictions and bans, that demonstrates the widespread employment of "expenditure limitations" in "personal use" statutes. (*See* Rowan Decl. at ¶ 2 and Exhibit A attached thereto.) The ubiquity of these statutes testifies to the need for such limitations, a need so universally understood that "personal use" statutes are seldom challenged, and it is virtually impossible to find an example of such a statute that has been overturned.

4. Limits On Spending Are Not *Per Se* unconstitutional Restrictions On Speech

Any limit on the ability of a candidate to convert campaign funds to personal use can be characterized as an "expenditure limitation." Indeed, they sometimes take the form of an outright ban on purchases or uses that are especially subject to abuse. Senator Migden may wish to characterize Section 89519 as an expenditure limit, but it is not a restriction in the same class as the two statutes found unconstitutional by this Court and the Eighth Circuit in the decisions cited by Senator Migden. Rather, it is a limit on the use of campaign funds only insofar as it requires a candidate to transfer campaign funds to a new campaign account before leaving office or, in the case of a defeated candidate, before the date on which the first post-election campaign report is due. In virtually all jurisdictions, a candidate's use of campaign funds is *never* without limit, as discussed above. Section 89519 imposes restrictions on the use of campaign funds if (but only if) a candidate leaves office without transferring surplus campaign funds to another campaign committee. It does this to ensure the integrity of personal use restrictions after a candidate leaves office. Senator Migden points to no reported decision holding

an "expenditure limit" of this sort to be unconstitutional. There are good reasons why she is unable to do so. The few cases actually considering such restrictions have upheld them.

5. Strict Scrutiny Does Not Apply To The Type Of Expenditure Addressed In Section 89519

Buckley v. Valeo, 424 U.S. 1 (1976), where the Supreme Court heard sweeping challenges to the federal counterpart of the PRA, provides the enduring framework against which campaign finance rules are evaluated for constitutional sufficiency. One notable feature of the *Buckley* paradigm is the distinction the high court drew between limitations on campaign expenditures, reviewed under strict scrutiny, and limitations on contributions, reviewed under a lesser standard. As summarized in a more recent Supreme Court opinion:

> [T]he Court applies the less rigorous standard of review applicable to campaign contribution limits under *Buckley* and its progeny. Such limits are subject only to 'closely drawn' scrutiny, *see* 424 U.S., at 25, 96 S.Ct. 612, rather than to strict scrutiny, because, unlike restrictions on campaign expenditures, contribution limits "entail only a marginal restriction upon the contributors ability to engage in free communication," *e.g., id.* at 20-21, 96 S.Ct. 612. Moreover, contribution limits are grounded in the important governmental interests in preventing "both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption."

McConnell v. Federal Election Commission, 540 U.S. 93, 94-95 (2003).

Since *Buckley*, courts have generally preserved this dichotomy between expenditure and contribution limits, applying more stringent scrutiny to the former. This is a reasonable approach when the expenditure limits at bar in a given dispute bear some resemblance to the expenditure limits at issue in *Buckley*. The federal law at issue in *Buckley* limited to $1,000 the total amount that could be spent by an individual or a group on speech relative to a candidate in a federal election. *Buckley*, 424 U.S. at 7. But it is more difficult to justify an equally stringent standard of review for "expenditure limits" of a dramatically different kind, such as "personal use" restrictions that limit or bar a candidate from using campaign funds to purchase a car for the candidate's personal use. A purchase of this nature is not an expenditure on political speech.

In addition, if a candidate is free to use campaign funds to supplement her personal income or lifestyle, the potential for corruption that justifies contribution limits is heightened because campaign funds can then be translated directly into financial gain for the candidate. *Nixon v. Shrink Missouri*

Government PAC, 528 U.S. 377 (2000), makes the obvious point that elected officials may be influenced to act contrary to their obligations of office by the prospect of "financial gain to themselves." (*Nixon*, 528 U.S. at 388-89.)

In short, this Court should not accept Senator Migden's assertion that the proper standard of review for a statute like the surplus funds provision of Section 89519 is the strict scrutiny applied to "expenditure limits" properly so called, wrongly claimed to carry with it a presumption of constitutional infirmity. But even if this court were to apply strict scrutiny to the "surplus funds" statute, because the novelty of Senator Migden's challenge leaves the court without a precedent on which to rely, the statute easily meets this higher standard of review. In either case, the analysis must begin from the state interest furthered by the statute, whose express purpose Senator Migden does not mention.

6. California Originally Enacted The Surplus Funds Statute At Issue To Curtail Candidates' Personal Use Of Funds

The surplus funds rule now under attack was enacted in 1981 through Senate Bill 42, as part of the California Legislature's first comprehensive suite of "personal use" restrictions, originally located in California Elections Code sections 12400 - 12409. (*See* Rowan Decl. at ¶ 4 and Exhibit C attached thereto.) Those statutes, little changed, are now codified at California Government Code sections 89511-89519. (*See id.* at ¶ 4.) The Sacramento Bee, in an article published on October 5, 1981 explained the need for this legislation as follows:

> Previously, office seekers with campaign surpluses would find uses for the funds for things other than financing the next election. Some purchased nifty sports cars or redecorated that drab apartment. Others dipped into the funds to pay income taxes, traffic tickets, divorce settlements, and even to pay off fines to the Fair Political Practices Commission.
>
> * * *
>
> The measure, SB 42 by Sen. Paul Carpenter, D-Cypress, imposes civil penalties for the misuse of campaign money and prohibits retiring lawmakers from taking the surpluses with them. Politicians with left-over money will be allowed to contribute it to another campaign, donate it to charity, return the money to contributors, or hold on to it for their own future campaigns. Politics should be a little cleaner because of this new law.

(*See* Rowan Decl. at ¶ 4 and Exhibits C & D attached thereto (including a copy of the original bill, SB42, and also in the legislative history, the foregoing Sacramento Bee Article).)

Senator Migden's moving papers do not refer to the legislative history of Section 89519, originally California Elections Code section 12404. The true purpose and function of this provision has profound implications for her constitutional claims, which are premised entirely on challenges to statutes serving very different purposes.

B. Senator Migden Is Not Entitled To Preliminary Injunction Under Any Test

A plaintiff must show either a combination of likely success on the merits and the possibility of irreparable harm or that serious questions of law are raised and the balance of hardships tips in its favor. *United States v. Nutri-Cology, Inc.*, 982 F.2d 394, 398 (9th Cir. 1992) (affirming district court denial of preliminary injunction).

1. Senator Migden Has Demonstrated Little Probability Of Success On The Merits

Senator Migden's probability of success on the merits can be summed up in a single sentence: there is no factual or legal support for Senator Migden's claims. Her challenge to Section 89519 fails to direct the court to a single reported decision holding such a statute unconstitutional, and fails even to mention the underlying governmental interest.

Senator Migden cites *Service Employees International Union v. Fair Political Practices Commission*, 955 F.2d 1312, 1322 (9th Cir. 1992) together with the prior district court decision, in support of her contention that Section 89519 is unconstitutional. But the initiative statute at issue in *SEIU* was an outright ban on intra-candidate transfers, a provision that barred a candidate from moving campaign funds from one of her controlled committees to another. As the trial court noted, the purpose of this transfer ban was originally to prevent circumvention of the contribution limits enacted by Proposition 73. But the court had found those contribution limits to be unconstitutional, eliminating this need. As a result, in the words of the trial court, "the sole justification offered for the inter-committee transfer ban is a notion that contributions given for one office ought not be diverted to another, because the donation was solicited and given with a particular office in mind." *Service Employees Int'l Union v. FPPC*, 747 F. Supp. 580, 591 (E.D. Calif., 1990).[9/]

9. In the quoted passage the trial court speaks of an "inter-committee transfer ban." Earlier in the same paragraph the court made it clear it was referring to "transfers among a candidate's own committees."

Had California's contribution limits been effect at the time, the result would have been different as evidenced by the analysis in *State of Alaska*, 978 P.2d 597. The state of Alaska did have valid contribution limits in place when its Supreme Court addressed a challenge, *inter alia*, to an Alaska statute requiring that a candidate transfer a limited portion of unused campaign contributions to a future campaign account within 90 days following an election, or 90 days following the withdrawal of a candidate (as applicable), with the remainder forfeited to the state. *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 631, n. 198 (1999) (citing Alaska statute 15.13.116, limiting amounts of funds candidates can carry forward). This statute is analogous to the statute in the present action, although it is more restrictive since it limits the amounts that can be transferred to a future campaign. In that case, plaintiff directed the court to *SEIU*, but the court distinguished it by pointing to the existence of valid contribution limits in Alaska, upon which the court concluded that Alaska's surplus funds rule passed constitutional muster because it prevented circumvention of the state's contribution limits. *Id.* at 631-32.[10/]

The second "parallel" offered by Senator Migden is the Eighth Circuit decision in *Shrink Missouri Government PAC v. Maupin*, 71 F.3d 1422, 1428 (8th Cir. 1995). The statute at issue in that case was a "spend down" provision, which required that a campaign account be liquidated after the election, with the exception of a small sum that could be used to defray expenses of holding office. *Id.* at 1427. The statute did not permit a candidate to transfer campaign funds to a future election account under any circumstances whatever.

The two decisions on which Senator Migden rests her claim are similar insofar as they considered statutes that, on the one hand prevented a candidate from *ever* using "surplus funds" left over from a campaign for any other campaign, and on the other required that surplus funds be reduced to an amount

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(*Ibid.*) Senator Migden's citation of a 1995 Opinion of the Attorney General (78 Op. Atty. Gen. Cal. 266 (1995)) adds no authority to her constitutional claims. The Attorney General was simply repeating the analysis of SEIU, assuming that the rationale employed in SEIU would apply equally to the "surplus funds" statute at issue here. The Attorney General engaged in no independent analysis, and spoke without any apparent knowledge or consideration of the instant statute's purpose, and how it differs from the statute and state interest at bar in SEIU.

10. California prevents circumvention of contribution limits by an alternative means; its surplus funds rule is designed to deter personal use of campaign funds by departed officeholders.

just sufficient to purchase office supplies. But they are unlike Section 89519, which does not ban the transfer of campaign funds to other campaign committees, but *requires* that any funds left over at the end of a campaign be transferred to a new campaign committee, *if* the candidate wishes to use them for future campaigns. Recognizing this, Senator Migden restates her claim to the following: "Rather, what the state has to justify is not a total ban on the use of funds raised for a prior election, but an arbitrary time deadline by which the candidate must transfer those funds." (Ps & As 16:21-23.)

The word "arbitrary" is employed by Senator Migden not to signify that the "deadline" should be shifted backward or forward in time – she suggests no alternative date – but to support her essential claim that *no* deadline can survive constitutional scrutiny. Candidates should simply be permitted to retain surplus campaign funds indefinitely after leaving office. Thus she challenges the constitutional sufficiency of a major concern underlying SB 42, that former office-holders could divert campaign funds to personal uses, and should be prevented from doing so. It goes without saying that nearly *every* "surplus funds" statute in the country establishes a date at which the funds become "surplus." Senator Migden can point to not one decision addressing such a claim, and not one decision concluding that the Constitution prohibits a state from determining that there is a date after which the use of campaign funds may be restricted.

2. Senator Migden's Unlikely Success On The Merits Is Obvious Once The Appropriate Standard Is Applied

The statute at issue, a measure enacted to deter "personal use" of campaign funds by former officeholders, should not be subject to the "strict scrutiny" applied to expenditure limits or bans of the sort overturned in the decisions cited by Senator Migden. A more appropriate standard of review for the statute at bar would be the standard applied to contribution limits, the "closely drawn" review discussed above, from the Supreme Court's recent review of campaign finance law in *McConnell*. 540 U.S. at 94-95. The impact of Section 89519 on core speech interests is attenuated because the *only* burden imposed on a candidate who has an intent to use existing campaign funds for a future campaign is a requirement that she transfer those funds to a new campaign account, from which her speech will be funded, before leaving office. At the same time, the potential for actual or perceived corruption is unusually high when campaign funds can be used in a way that offers the "prospect of financial gain"

to a candidate. *Nixon*, 528 U.S. at 388-89. "Closely drawn" scrutiny requires this Court to determine whether the restriction is "closely drawn" to match a "sufficiently important interest." *Buckley*, 424 U.S. at 25-29.

The more challenging standard is "strict scrutiny," whose requirements are outlined by the Ninth Circuit in its recent opinion *California Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172 (9th Cir. 2007). In that case, the Ninth Circuit applied "strict scrutiny" to the PRA's definition of the term "contribution," although the court recognized that there was "a lack of clarity regarding the appropriate level of scrutiny" required by the nature of the claims in that dispute. (*Id.* at 1175). Beginning three pages later, the Ninth Circuit applied strict scrutiny to the matter at hand, asking whether the state had advanced a compelling state interest in regulating contributions to groups like the plaintiff in that action, and then whether the challenged provisions were "narrowly tailored" to that interest. On the latter point, the court explained:

> In determining whether legislation is narrowly tailored, we consider whether the restriction "(1) promotes a substantial government interest that would be achieved less effectively absent the regulation, and (2) [does] not burden substantially more speech than is necessary to further the government's legitimate interest."

Id. at 1183, internal quotation marks omitted.[11/]

Even if this Court concludes that the novelty of Senator Migden's challenge leaves the proper standard of review in doubt, requiring application of "strict scrutiny," Section 89519 can readily be shown to be "narrowly tailored" to a "compelling governmental interest." The governmental interest served by Section 89519 is limiting the personal use of surplus campaign funds by former candidates who could thus be "influenced to act contrary to their obligations of office by the prospect of financial gain to themselves."[12/] (*Nixon*, 528 U.S. 388-89.) This was the express purpose for the enactment of what is now Section 89519, as is clear from the legislative history. (*See* Rowan Decl. at ¶ 4 and Exhibit E attached thereto.)

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11. *Nixon*, 528 U.S. at 391. At 507 F.3d at 1186, the court also noted that a regulation need not be the "least restrictive means" to an end in order to be narrowly tailored, a point that sometimes causes confusion.

12. The Supreme Court observed in *Nixon*: The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised. Buckley demonstrates that the dangers of large corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible. *Nixon*, 528 U.S. at 391.

There can be little doubt that California has a *compelling* interest in reducing the prospect of campaign funds remaining available to a former candidate for conversion to personal use after an official leaves office with surplus campaign funds on hand. A provision that requires candidates to transfer campaign funds to new campaign bank accounts, and to expend "surplus funds" for the limited purposes described by the statute, limits the capacity of a former candidate to divert those funds to personal use, yet permits candidates to retain all campaign funds *as campaign funds*, unless a candidate leaves office with no thought of running for office in the future.[13/] Given the concerns established in the legislative history regarding misuse of campaign funds by former candidates, it can hardly be said that a statute restricting the use of such funds by *former* candidates is not "narrowly tailored" to that concern.

Senator Migden failed to transfer her campaign funds prior to leaving office, but that failure is not evidence that Section 89519 is not narrowly tailored. Considering the purpose of Section 89519, it is important that the statute provide a clear statement of *when* a candidate becomes a "former candidate," and when campaign funds become "surplus funds."

The distinction between a candidate and a former candidate is easily defined by the clear, objective dates specified at Section 89519(a), and it has great real-world significance as well. As the Declaration of Carla Wardlow ("Wardlow Decl.") explains, it is not possible for regulatory agencies to closely monitor the completeness and accuracy of campaign reports filed by thousands of candidates and former candidates for state and local elective offices.[14/] Former candidates, who are no longer running for office, inevitably tend to become less newsworthy in general. (*See* Wardlow Decl. at ¶ 11.) But more importantly, they have no rival candidates to monitor their campaign reports. The simple fact is

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13. Any candidate with plans for future campaigns may set up a committee and transfer the funds to preserve those plans – the PRA does not prevent those funds from being transferred again into a new committee if the candidate later decides to run for a different office. All that is required is that a candidate have *some* plan, on leaving office, for a future campaign, and that the candidate preserve her options by transferring her campaign funds to a new campaign account established for that future campaign. Before the funds became surplus, Senator Migden had open two committees for future elections: 2002 election to the Board of Equalization and 2004 election to State Senate. But she did not transfer those funds into either of them.

14. Former candidates, whose old campaign committees have not yet paid off their debts or otherwise wound up their affairs, are required under the PRA to continue filing periodic campaign reports until their committees are formally closed.

that the most careful and critical observer of candidate expenditures and funding are other candidates running for the same office, along with their supporters and the news media. To keep up with the realities and occasional inaccuracies in campaign reports, the FPPC relies heavily on complaints initiated by these interested and closely informed persons. Former candidates simply cannot be monitored as thoroughly as candidates.

Significantly, the requirement that campaign committees file periodic reports disclosing their receipts and expenditures leaves open the possibility that the reports may be inaccurate. To encourage full and *accurate* reporting, campaign committees are subject to periodic audits by the Franchise Tax Board. Because it is impossible to audit every campaign committee at the end of every reporting period, only a fraction of committees are selected (randomly) for audit. But when a campaign committee is closed, it is no longer subject to audit. (*See* Wardlow Decl. at ¶ 11.) There is opportunity here for a campaign committee to file its final report with inaccurate accounts. If a committee is not selected on that occasion for an audit, any inaccuracies are most unlikely ever to be detected.

This is why the Legislature included among its "personal use" restrictions a provision that limited opportunities for former candidates to convert left-over campaign funds to personal uses. Such uses are generally unlikely to be detected after the end of a public career, and when "golden parachutes" funded by campaign contributions are available to legislators, contributions are all the more valuable. This increased "value" increases the capacity of campaign contributions to influence candidates to act contrary to their obligations of office while they remain in office and, of course, newspaper accounts of misused funds increases the perception of corruption.

It is also true that some personal uses of campaign funds may be all too public, actively generating a public perception of corruption. For example, candidates commonly spend campaign funds for personal travel and meals, a practice that has recently generated extensive press accounts of lavish "lifestyle" spending for very questionable purposes. These reports reinforced FPPC staff concerns on theses issues and, as a result the FPPC recently adopted regulations requiring candidates to disclose on their campaign reports specific information about their use of campaign funds for, among other things, travel and meals, requiring also that they maintain sufficient documentation to show the political, legislative, or governmental purposes for these expenses. (*See* Declaration of Scott J. Hallabrin, ¶ 4 and

Exhibits A, B, and C attached thereto.) But under Section 89519, once campaign funds have become surplus they may no longer be used for travel or meals. The restriction on the use of surplus campaign funds here too serves important governmental interests that are entirely unrelated to a candidate's campaign "speech."

Senator Migden ultimately contends that it is unconstitutional to require a candidate to transfer campaign funds before leaving office. The problem of oversight presented by former candidates managing campaign funds outside the public eye is compounded by another problem illustrated by Senator Migden's own circumstances. The requirement that candidates transfer campaign funds to a "current" committee, if it has any effect at all on a particular candidate, tends to reduce the number of outstanding committees and bank accounts that a candidate must manage. The more complex a candidate's financial affairs, the more potential there is for misreporting campaign finances, whether intentionally or inadvertently.

A statute that limits the use of campaign funds by former officeholders not seeking reelection to the previously held office is "narrowly tailored" to a compelling state interest in deterring conversion of these funds by retired officeholders to their personal use. The widespread employment of similar provisions outside California shows that California's interest has been recognized as a serious concern by legislatures across the country. The employment of "surplus funds" provisions in numerous states demonstrates a kind of evolutionary convergence that, given the absence of alternative schemes, demonstrates that "surplus funds" statutes are vital components of statutory programs aimed at reducing the corrupting "personal use" of campaign funds. And the absence of a developed body of reported case law in this area is evidence of a nationwide consensus that such provisions are facially constitutional.

C. Senator Migden's "As Applied" Challenge Fails Based On The Applicable Facts

Without going into detail that will be supplied by Defendants' counterclaim, the campaign funds in Senator Migden's 2000 Assembly committee became surplus in December, 2002. Most of those funds had earlier been transferred from the Assembly committee bank account (as permitted under California Code of Regulations, tit. 2, Section 18524(b)) to a money market account associated with the Assembly committee. The FPPC does not purport to know the reason or reasons why Senator Migden did not transfer the money market funds back to the Assembly committee checking account, and transfer

them to one of the two committees she had opened for future elections prior to her leaving office and closing down the Assembly committee. But bank records subpoenaed by the FPPC prove that she did not move those money market funds back into the Assembly committee checking account as required by Cal. Code. Regs., tit. 2, § 18524(b). Rather, she used the money directly from the money market account for payments to her controlled committees for her election for other California offices, contrary to Section 89519. The campaign reports actually disguise much of what the bank records establish.

More specifically, as will be explained in Defendant's counterclaim, the bank records and campaign statements filed by four of Carole Migden's controlled committees show that she, and they, engaged in a pattern of deliberate conduct over a period of at least five years through which they concealed from the public the source of over $1,000,000 in amassed campaign funds contributed by Carole Migden to three of her controlled committees to support her candidacy for elective office, after those funds became surplus within the meaning of Section 89519. Section 89519 expressly prohibits a candidate or committee from using surplus campaign funds for contributions to support candidates for elective office in California.

Moreover, Carole Migden and her agents used statutorily required campaign statements to disguise these unlawful acts. This pattern of concealment began with two statements filed in 2003, which disclosed that Carole Migden's Assembly Committee transferred its entire cash balance of about $977,000 to her 2004 Senate Committee after Senator Migden left the Assembly. This transfer never took place. In fact, after Carole Migden left the Assembly, the Assembly Committee continued to hold open two bank accounts established in the name of the Assembly Committee and the accounts remained open with combined balances in excess of $900,000 and earned interest for years after Carole Migden left the Assembly.

Indeed, after filing a statement under penalty of perjury that the Assembly Committee terminated in June 2003, the accounts established in the name of the Assembly Committee continued to have significant activity for many years after June 2003:

- Between July and November 2003, the checking account made three payments totaling $55,000 to Senator Migden's committee formed for her election in 2002 to the State Board of Equalization.
- In 2004, the checking account made a $2,000 payment to Migden's committee for election in 2004 to State Senate.
- In 2006, the money market account made a payment of $350,000 to Migden's committee formed for her re-election in 2008 to State Senate.
- In 2007, the money market account made two payments totaling about $634,645 to Migden's committee formed for her election in 2004 to State Senate.

To date, none of these payments have been disclosed by the Assembly Committee or the Board of Equalization, Senate 2004, and Senate 2008 committees.

Notably, Senator Migden and her Board of Equalization Committee engaged in similar conduct. After Senator Migden left the Board of Equalization, $25,000 of that committee's surplus campaign funds were used for a payment to Senator Migden's committee formed for her re-election to State Senate in 2008.

These violations, taken together, are very serious in nature. A candidate with more than $900,000 in a campaign bank account, who then moved the funds into a money market account, left office, and closed the committee, has taken a series of steps enabling her, if undetected at the time she closed the committee, to later withdraw those money market funds and abscond. Once the campaign committee was closed, there would be no further campaign reports to attract the attention of interested observers. As a former officeholder not seeking further office, she would have no opponent to scrutinize her campaign affairs and possibly investigate past campaign reports, while the media would likewise be focused on current races, offering the departed official good reason to hope that her conversion of the campaign funds would go undetected.

The FPPC certainly does not contend that Senator Migden had any such a plan in mind. The point is made simply to illustrate how *all* of the rules governing the transfer of campaign funds, including the surplus funds rule, work together to deter misconduct of this sort. When a candidate effectively announces her intention not to seek further office by permitting her remaining campaign

funds to become surplus, she is required to return them to the campaign bank account and report their disposition as required by the surplus funds statute before closing the committee in which they are held. If there were no such requirement, or if such "closure" were long delayed, the opportunities for conversion of these funds to personal use are increased.

The circumstances pertinent to Senator Migden's "as applied" challenge amount to a pattern of inexplicable and repeated disregard for numerous critical reporting and transfer requirements in addition to the surplus funds statute. There are simply too many discrete violations to support a conclusion that her "circumstances" were such that the U.S. Constitution requires that she be excused from compliance with Section 89519.

4. Section 89519 Is Facially Valid, And Is Not Weakened By Senator Migden's Reliance On Inapplicable Case Law.

As explained above, the two reported decisions on which Senator Migden relies for the proposition that expenditure limits are "almost always" found to be unconstitutional, the Ninth Circuit's opinion in *SEIU*, and the Eight Circuit's opinion in *Shrink Missouri Government PAC,* address statutes that bear no resemblance to Section 89519. In fact, these two decisions were the basis of plaintiff's claim in *State of Alaska v. Alaska Civil Liberties Union*. 972 P.2d 597 (1999). The Alaska Supreme Court dismissed both *Shrink Missouri* and *SEIU* as inapposite to the matter before it. Interestingly, the court saw a parallel with *SEIU*, where the state interest in circumvention of contribution limits was found not to support a ban on transfers ("carryovers") of campaign funds into future elections because California's contribution limits had been found unconstitutional. *Id.* at 631-32. Alaska *had* valid contribution limits, and the court concluded that this was a critical distinction; Alaska's transfer limit easily passed constitutional muster.

California's interest in Section 89519 is more compelling than the interest supporting Alaska's much more restrictive surplus funds statute. California has found less intrusive means to prevent circumvention of its contribution limits, by requiring "attribution" to particular donors of any campaign funds carried forward (Cal. Gov't Code § 85306(a)), and therefore the PRA does not limit the amount of campaign funds that can be transferred to a committee established for a future election. The interest served by California's surplus funds statute is, as discussed above, to ensure that campaign funds are

actually put to use in campaigns, by limiting the possibility that they could be diverted to the personal use of the candidate.

The statute is narrowly tailored to that compelling state interest because it freely permits transfers of campaign funds by persons like Senator Migden to *any* committee for *any* future office, so long as the transfer is made before the candidate leaves office. Senator Migden alleges that setting a deadline for such a choice, any deadline at all, is "arbitrary" and unconstitutional as such. Her constitutional alternative, however, is that California must permit former officeholders to retain their campaign funds, evidently, until they die or the money disappears. The money could well have disappeared in this instance, because it had been transferred to a money market account after which the committee was closed, rendering nearly $900,000 invisible.

Against a facial challenge, in equity, on a motion for preliminary injunction to which an Opposition must be filed before the FPPC has filed its Answer and Counterclaim, this Court should bear in mind that Senator Migden left funds in a money market account established in the name of the Assembly committee *after* she left the Assembly from which they were *never* lawfully transferred to any other campaign account. Nor did she return the money to the Assembly committee checking account as she was required to do before spending it. Moreover, compounding these violations, she spent the money in ways that are decidedly outside the enumerated allowable ways to spend surplus funds. This circumstance invites the undetected conversion to personal use of funds given for use in prior campaigns.

If this Court were inclined to grant Senator Migden any relief, it should do so by an expedited motion for summary judgment on the FPPC's Counterclaim, where the court can review this evidence in detail. This court should not rush to a preliminary conclusion that would permit Senator Migden to consume those funds before a full evidentiary hearing can be held, and place California among the small minority of states that do not have any effective limit on the use of campaign funds after an officeholder has ceased to campaign for office.

But on the facial claim, this court already has more than enough grounds from which to conclude that California has a compelling interest in limiting the uses to which campaign funds may be put after an officeholder leaves office without having taken steps to open a new campaign for some office, and that Section 89519 is narrowly tailored to serve that compelling interest.

On the "as applied" claim, the result is no different. Senator Migden does not allege, and cannot allege,

that she was in some fashion incapable of complying with the one bank account, reporting, and surplus funds provisions that she violated beginning in 2003. Senator Migden has no probability of ultimate success on the merits. Her aim is to spend the money before this court can issue a final judgment.

C. Plaintiff Has Failed To Show That Serious Questions Of Law Are Raised Or That The Balance Of Harm Tips In Her Favor.

1. A "Serious Question Of Law" Is Not One On Which Plaintiff Has No Chance Of Success On The Merits.

Courts characterize a "serious question of law" as one to which a moving party has a "fair chance of success on the merits." As discussed above, Plaintiff does not meet even this threshold inquiry. *Benda v. Grand Lodge of the International Association of Machinists*, 584 F.2d 308, 315 (1978).

2. The Balance Of Hardship Tilts Sharply In Favor Of Defendants

The state of California and the FPPC will will be irreparably injured should this Court enjoin the contested provision of the PRA. As the Ninth Circuit has explicitly stated, "[i]t is clear that a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined." *Coalition for Economic Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997). This alone tilts the balance scale as far as it can go in favor of Defendants.

But the harm she asks this court to impose by way of preliminary injunction is certainly no less injurious. This harm is compounded by the harm already inflicted on the people of the State of California by Senator Migden's repeated violations of the PRA as will be discussed in Defendants' counterclaim as summarized *supra* in Section III.B.3.

The scale does not tilt in Senator Migden's direction, no matter how furtively she weighs on it. First, there is no deprivation of Senator Migden's constitutional rights, as detailed above. Second, any alleged hardship is of her own creation. In Section III.B.3., above, Defendants summarize Senator Migden's repeated violations of the PRA. The "hardship" finds its inception there.

And finally, a proper application of the FPPC's opinion, *In re Pirayou*, 19 FPPC Ops. 1 (2006) (attached as Exhibit B to the Harrison Declaration in Support of Plaintiff's Motion for Preliminary Injunction) highlights each and every time Senator Migden could have prevented such alleged "hardship," but did not. Most strikingly, the facts under which each party approached the FPPC are entirely different. Ms. Corbett made her request to the FPPC six months after she discovered her failure

to transfer funds. *In re Pirayou,* 19 FPPC Ops. at p.2. Senator Migden's failure to transfer funds occurred five years before that failure was discovered during an FPPC investigation.

When Ms. Corbett initially made her request, she had not transferred or expended surplus funds, and thus, she was not subject to the imposition of fines by the FPPC. (*Id.*) Senator Migden transferred and expended surplus funds for unlawful purposes, and consequently is subject to the imposition of fines by the FPPC in amounts that exceed the balance of her remaining surplus funds.[15/]

Ms. Corbett's request to spend surplus funds was initially rejected by FPPC staff. (*Id* at p.3.) After the discovery of Senator Migden's transfers and expenditures, the FPPC Enforcement Division sent Senator Migden a "Demand for Compliance" to refrain from further spending the surplus funds in dispute on her 2008 reelection campaign "unless you obtain authorization from the FPPC's Executive Director under Regulation 18404.1 to reopen the Committee to Re-Elect Carole Migden (ID#962662)" [the committee from which the surplus funds were initially transferred]. (*See* Exhibit A to Harrison Declaration). There is no record, nor has any evidence been offered, that Senator Migden made a request to reopen that committee or any other committee. (*See* Declaration of Michael B. Salerno, at ¶ 3 ("Salerno Decl.").)

Ms. Corbett asked the Commission for a formal opinion under California Government Code Section 83114(a) challenging the FPPC staff determination. *In re Pirayou* 19 FPPC Ops. 1. The Commission rendered an opinion allowing her to transfer funds, with attribution, due to "extraordinary circumstances presented." *Id.* The last paragraph of the opinion states that any person who believes "extraordinary circumstances supported by sworn testimony similar to this factual scenario exist, and can also provide additional documentary evidence corroborating the material facts contained in their sworn testimony" may seek a commission opinion for reconsideration of the staff advice, "and, only if deemed appropriate by its Executive Director, will the request be considered by the Commission." *Id* at p.8. There is no record, nor has any evidence been offered, that Senator Migden made a request of the Executive Director for a Commission opinion considering the Enforcement Division staff's Demand for Compliance. (*See* Salerno Decl. at ¶ 5.)

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15. California Government Code section 89521 provides treble damages for Senator Migden's expenditure violations, and for her reporting violations. California Government Code section 91004 authorizes recovery equal to the amount misreported.

Combined with her poor likelihood of success in a constitutional challenge to a statute that is an integral part of California's limits on the "personal use" of campaign funds, a class of statute unchallenged in virtually every jurisdiction in the United States, this court should conclude that the balance of harms tilts in favor of the people of California.

3. Bond Requirement

The Federal Rules of Civil Procedure state that no injunction is appropriate unless the moving party posts a security. Federal Rule Civil Procedure 65(c). Defendants do not think it is appropriate that this Court waive the bond requirement in this case as the thrust behind Senator Migden's motion is to avoid the financial consequences of her error.

CONCLUSION

This court should deny Senator Migden's motion for preliminary injunction, and direct that she retain the disputed funds in the bank account presently holding them, until this court can issue a final judgment on the merits of the parties respective claims.

Dated: March 18, 2008

Respectfully submitted,

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